A

Dato' Chan Kon Tak v Malaya Harvest Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-206–05 OF 2021
ADLIN ABDUL MAJID JC
28 JUNE 2022

C *Companies and Corporations — Derivative action — Application for — Application for leave to initiate derivative action on behalf of defendant — Whether the plaintiff was acting in good faith — Whether action brought by plaintiff for collateral purpose and personal interest — Whether it was prima facie in the best interest of defendant for leave to be granted — Companies Act 2016 ss 347 & 348*

D

The plaintiff filed this originating summons, seeking leave to commence an action in the name and for the benefit of the defendant, against a director of the defendant, Sharon Ho, and parties who allegedly conspired with her. The E defendant's shareholders were the plaintiff, with 50% shares, and Sharon Ho with the remaining 50% shares. The plaintiff claimed that he discovered wrongdoings carried out by Sharon Ho, her son Desmond Lee and Desmond Lee's wife, Christine Yong, including wrongful payments of director's fees and salaries, disposal of assets without approval and embezzlement of funds. F Further, the plaintiff claimed that he was denied access to the defendant's bank account, and was kept in the dark on the defendant's transactions. Hence the present application. The defendant in resisting the plaintiff's application contended that the plaintiff, as a de facto director of the defendant, was aware of the payments made to Sharon Ho as a director of the defendant, and G Desmond Lee and Christine Yong as employees of the defendant. The defendant also alleged that the plaintiff had committed wrong-doings, inter alia: (a) he unilaterally appointed his wife, Sophia Cai, to oversee the defendant's operations and finance in Shanghai, and represented that the defendant had a 'Shanghai Office'. This was done without approval from H Sharon Ho; and (b) the defendant had been dealing with Shanghai Youxiang Co Ltd ('Shanghai Youxiang') since June 2020, at the instructions of the plaintiff. Shanghai Youxiang had initially placed orders with the defendant, but subsequently cancelled its orders. The defendant refunded Shanghai Youxiang's payment, as instructed by the plaintiff. In October 2020, the defendant I discovered that the plaintiff was the executive director of Shanghai Youxiang, while Sophia Cai was its shareholder and director. This put the plaintiff in a position of conflict of interest, considering his role in the defendant. The defendant, therefore, had cancelled the plaintiff's access to the defendant's account, due to concerns of misuse of the defendant's funds. The issues that

arose for determination were: (i) whether the plaintiff was acting in good faith; (ii) whether this action was bought by the plaintiff for a collateral purpose and for his personal interest; and (iii) whether it was prima facie in the best interest of the defendant that this application for leave was granted.

Held, dismissing the application with costs:

(1) The plaintiff had not proven, on a balance of probabilities, that he was acting in good faith. This was because he had not sufficiently shown that a good cause of action with a reasonable prospect of success exists. The plaintiff's allegations appear to have been grounded on conjectures made from the plaintiff's perusal of the defendant's accounts. They were in essence based on speculation and suspicions of impropriety without the support of sufficient evidence. The plaintiff's allegations that Sharon Ho, Desmond Lee and Christine Yong created fictitious transactions, conducted improper accounting and deliberately inflated the defendant's expenses were also rebutted by the defendant. The defendant's responses were more probable than the plaintiff's allegations. The plaintiff's claims that the defendant had failed to fulfil contractual obligations and to make the necessary refunds to Shanghai Youxiang also lacked good faith. This was because the plaintiff was the executive director of Shanghai Youxiang, while his wife Sophia Cai was its shareholder and director. His conduct in the management of the orders of Shanghai Youxiang demonstrated how he put himself in a position of conflict of interest, by placing the interests of Shanghai Youxiang over the interests of the defendant. On the claim that Desmond Lee had failed to top up the capital of the defendant, the court accepted the defendant's argument that Desmond Lee was under no obligation to top up the defendant's capital (see paras 22, 24 & 26–28).

(2) The relief sought by the plaintiff in this action was not sought on behalf or for the benefit of the defendant, but was made in the interest of Shanghai Youxiang and for the plaintiff's personal purposes. The plaintiff's private interests, specifically those arising from the defendant's dealings with Shanghai Youxiang, did not coincide with the interests of the defendant. The return of the refund to Shanghai Youxiang would in fact be at the expense of the defendant. Therefore, the second element of the test of good faith had not been met by the plaintiff (see paras 31–33).

(3) The plaintiff's role in Shanghai Youxiang created a conflict of interest with his role in the defendant. The plaintiff had unilaterally determined the exchange rate for orders which would have resulted in a loss to the defendant at the benefit of Shanghai Youxiang, insisted on refunds being paid to Shanghai Youxiang without taking into account costs arising from the cancelled orders, and represented that Shanghai Youxiang would use packaging for the cancelled orders for further orders, which

were not forthcoming. The plaintiff's role in Shanghai Youxiang and the way he conducted business with Shanghai Youxiang demonstrated a conflict of interest on his part, and was indicative of a lack of good faith in his seeking leave to initiate a derivative action against the defendant (see paras 34 & 36).

(4) The reliefs claimed on behalf of the defendant were for declarations that Sharon Ho breached her fiduciary duties as a director of the defendant, that Sharon Ho, Desmond Lee and Christine Yong conspired to injure the defendant, and for an account of sums received and an order for payment of sums received by Sharon Ho, Desmond Lee and Christine Yong to the defendant. Taking these proposed reliefs into account and considering that the defendant had ceased its business, there would not be any practical gain for the defendant if the plaintiff was allowed to proceed with the derivative action.The plaintiff's prayer for the defendant to bear all costs and expenses on an indemnity basis to pursue the claims against Sharon Ho, Desmond Lee and Christine Yong were grounded primarily on his personal grievances and would result in severe financial implications for the defendant. As such, it would not be in the commercial interest of the defendant to pursue the proposed derivative action (see paras 40–42).

[Bahasa Malaysia summary

Plaintif memfailkan saman pemula ini untuk memohon kebenaran untuk memulakan tindakan bagi pihak defendan, terhadap pengarah defendan, Sharon Ho, dan pihak-pihak yang melakukan konspirasi dengannya. Pemegang saham defendan adalah plaintif, dengan 50% saham, dan Sharon Ho dengan baki 50% saham. Plaintif mendakwa terdapat salah laku yang dilakukan oleh Sharon Ho, anak lelakinya Desmond Lee dan isteri Desmond Lee, Christine Yong, termasuk pembayaran fi dan gaji pengarah secara salah, pelupusan aset tanpa kelulusan dan dana yang digelapkan. Selanjutnya, plaintif mendakwa beliau dinafikan akses kepada akaun bank defendan, dan disimpan secara gelap dari transaksi defendan. Oleh itu permohonan ini difailkan. Defendan dalam membantah permohonan plaintif berhujah bahawa plaintif, sebagai pengarah de facto defendan, mengetahui bayaran yang dibuat kepada Sharon Ho adalah sebagai pengarah defendan, dan Desmond Lee dan Christine Yong sebagai pekerja defendan. Defendan juga mendakwa bahawa plaintif telah melakukan perbuatan yang salah, antara lain: (a) dia secara bersendirian melantik isterinya, Sophia Cai, untuk menyelia operasi dan kewangan defendan di Shanghai, dan menunjukkan bahawa defendan mempunyai 'Pejabat Shanghai'. Hal ini dilakukan tanpa kelulusan daripada Sharon Ho; dan (b) defendan telah berurusan dengan Shanghai Youxiang Co Ltd ('Shanghai Youxiang') sejak Jun 2020, atas arahan plaintif. Shanghai Youxiang pada mulanya telah membuat pesanan dengan defendan, kemudiannya membatalkan pesanannya. Defendan membuat pembayaran

balik kepada Shanghai Youxiang, seperti yang diarahkan oleh plaintif. Pada Oktober 2020, defendan mendapati plaintif merupakan pengarah eksekutif Shanghai Youxiang, manakala Sophia Cai merupakan pemegang saham dan pengarahnya. Hal ini meletakkan plaintif dalam kedudukan konflik berkepentingan, memandangkan peranannya dalam syarikat defendan. Oleh itu, defendan telah membatalkan akses plaintif ke akaun defendan, kerana bimbang penyalahgunaan dana defendan. Isu-isu yang timbul untuk penentuan mahkamah ini adalah: (i) sama ada plaintif bertindak dengan niat baik; (ii) sama ada tindakan ini dilakukan oleh plaintif untuk tujuan tertentu dan untuk kepentingan peribadinya; dan (iii) sama ada secara prima facie demi kepentingan defendan bahawa permohonan kebenaran ini telah diberikan.

Diputuskan, menolak permohonan dengan kos:

(1) Plaintif tidak membuktikan, atas imbangan kebarangkalian, bahawa dia bertindak dengan niat baik. Hal ini kerana dia tidak menunjukkan secara mencukupi bahawa tindakan yang dilakukan adalah baik dan wujud prospek kejayaan yang munasabah. Dakwaan plaintif berasas kepada anggapan yang dibuat daripada keterangan plaintif mengenai akaun defendan. Mereka hanya melakukan spekulasi dan syak wasangka mengenai ketidakpatuhan tersebut tanpa sokongan bukti yang mencukupi. Dakwaan plaintif bahawa Sharon Ho, Desmond Lee dan Christine Yong mewujudkan transaksi rekaan, melakukan satu perakaunan tidak wajar dan sengaja meningkatkan perbelanjaan defendan juga dibantah oleh defendan. Jawapan defendan tersebut lebih berkemungkinan daripada dakwaan plaintif. Dakwaan plaintif bahawa defendan telah gagal memenuhi tanggungjawab kontrak dan membuat bayaran balik yang diperlukan kepada Shanghai Youxiang juga tidak mempunyai niat baik. Hal ini kerana plaintif merupakan pengarah eksekutif Shanghai Youxiang, manakala isterinya Sophia Cai merupakan pemegang saham dan pengarahnya. Tindakannya dalam menguruskan pesanan Shanghai Youxiang menunjukkan bagaimana dia meletakkan dirinya dalam kedudukan konflik berkepentingan, dan meletakkan kepentingan Shanghai Youxiang atas kepentingan defendan. Mengenai dakwaan bahawa Desmond Lee telah gagal menambah modal defendan, mahkamah menerima hujah defendan bahawa Desmond Lee tidak berkewajipan untuk menambah modal defendan (lihat perenggan 22, 24 & 26–28).

(2) Relif yang dipohon oleh plaintif dalam tindakan ini tidak dipohon bagi pihak atau untuk kepentingan defendan, tetapi dibuat demi kepentingan Shanghai Youxiang dan tujuan peribadi plaintif. Kepentingan peribadi plaintif, khususnya yang timbul daripada urusan defendan dengan Shanghai Youxiang, tidak bertepatan dengan kepentingan defendan. Pemulangan bayaran balik ke Shanghai Youxiang sebenarnya akan merugikan defendan. Oleh itu, elemen kedua ujian niat baik tidak

dipenuhi oleh plaintif (lihat perenggan 31–33).

(3) Peranan plaintif di dalam Shanghai Youxiang mewujudkan konflik kepentingan dengan peranannya dalam defendan. Plaintif secara bersendirian telah menentukan kadar pertukaran untuk pesanan yang boleh mengakibatkan kerugian kepada defendan untuk faedah Shanghai Youxiang, memaksa pembayaran balik dibayar kepada Shanghai Youxiang tanpa mengambil kira kos yang timbul daripada pesanan yang dibatalkan, dan menunjukkan bahawa Shanghai Youxiang akan menggunakan pembungkusan untuk pesanan yang dibatalkan untuk pesanan selanjutnya, yang mana tidak pun muncul. Peranan plaintif di Shanghai Youxiang dan cara dia berurusan dengan Shanghai Youxiang menunjukkan konflik kepentingan di pihaknya, dan menunjukkan kekurangan niat baik untuk memohon kebenaran tindakan derivatif terhadap defendan (lihat perenggan 34 & 36).

(4) Relif-relif yang dipohon bagi pihak defendan adalah untuk pengisytiharan bahawa Sharon Ho telah melanggar tugas fidusiarinya sebagai pengarah defendan, bahawa Sharon Ho, Desmond Lee dan Christine Yong berkonspirasi untuk merugikan defendan, dan bagi suatu akaun jumlah wang yang diterima dan perintah pembayaran jumlah wang yang diterima oleh Sharon Ho, Desmond Lee dan Christine Yong kepada defendan. Mengambil kira relif yang dipohon ini dan memandangkan defendan telah menghentikan perniagaannya, tiada sebarang keuntungan untuk defendan sekiranya plaintif dibenarkan meneruskan tindakan derivatif tersebut. Permohonan plaintif untuk defendan menanggung semua kos dan sebarang perbelanjaan sebagai indemniti bagi meneruskan tuntutan terhadap Sharon Ho, Desmond Lee dan Christine Yong adalah berdasarkan kerugian peribadinya dan ianya akan mengakibatkan implikasi kewangan yang teruk kepada defendan. Oleh itu, ianya bukan demi kepentingan komersial defendan untuk meneruskan tindakan derivatif seperti yang dipohon (lihat perenggan 40–42).]

Cases referred to

Ang Thiam Swee v Low Hian Chor [2013] 2 SLR 340, CA (refd)
Celcom (M) Bhd v Mohd Shuaib Ishak [2011] 3 MLJ 636, CA (folld)
Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2019] 10 MLJ 693, HC (refd)
Eow Fun Siew & Anor v Mutual Life Sdn Bhd [2017] MLJU 1387, HC (refd)
Fazal Ellahi Oli Mohamed & Anor v KM Oli Mohamed Sdn Bhd [2020] MLJU 2328; [2020] 1 LNS 221, HC (refd)
FMC Petroleum Equipment (Malaysia) SDN BHD v FMC Wellhead Equipment Sdn Bhd & Anor [2019] MLJU 473; [2019] 1 LNS 758, HC (refd)
Lembaga Tabung Angkatan Tentera v Prime Utilities Bhd [2013] 7 MLJ 831, HC (refd)

Mahbubul Matin v Firoze Muhammad Zahidur Rahman & Anor [2019] MLJU 1585; [2019] 1 LNS 832, HC (refd)
Ong Keng Huat v Fortune Frontier (M) Sdn Bhd & Anor [2015] 11 MLJ 604, HC (refd)
Swansson v RA Pratt Properties Pty Ltd & Anor [2002] NSWSC 583 (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 181A, 181B, 181C, 181D, 181E
Companies Act 2016 ss 345, 347, 348

Keong Ming Wai (with Lim Kuan) (The Law Office of Wong & Ang) for the plaintiff.
Kwong Chiew Ee (with Sean Ong) (Rahmat Lim & Partners) for the defendant.

Adlin Abdul Majid JC:

INTRODUCTION

[1] The plaintiff filed this originating summons, seeking leave to commence an action in the name and for the benefit of the defendant, against the director of the defendant, Sharon Ho, and parties who allegedly conspired with her.

[2] I dismissed the originating summons, for the reasons set out below.

THE PLAINTIFF'S CASE

[3] The defendant was incorporated on 19 May 2020. Its shareholders are the plaintiff, with 50% shares, and Sharon Ho with the remaining 50% shares.

[4] The defendant's business includes sourcing and processing of durian fruits, rental of factory and purchase of equipment.

[5] The business was discontinued in October 2020. In effect, the defendant only carried on business for five months.

[6] The plaintiff claimed that he discovered wrongdoings carried out by Sharon Ho, her son Desmond Lee and Desmond Lee's wife, Christine Yong, including wrongful payments of director's fees and salaries, disposal of assets without approval and embezzlement of funds.

[7] Further, the plaintiff claimed that he was denied access to the defendant's bank account in November 2020, and was kept in the dark on the defendant's transactions.

[8] The plaintiff therefore filed the originating summons, seeking leave to initiate an action on behalf of the defendant against Sharon Ho, Desmond Lee and Christine Yong.

THE DEFENDANT'S CASE

[9] The defendant claimed that the plaintiff was a *de facto* director of the defendant, having been heavily involved in the running of the defendant, including giving instructions to employees, making strategic and operational decisions, preparing marketing materials, brochures and business cards, authorising payments to third parties and ensuring that the defendant meets its statutory obligations.

[10] Thus, it was claimed that the plaintiff was aware of the payments made to Sharon Ho as a director of the defendant, and Desmond Lee and Christine Yong as employees of the defendant. The sale of the assets of the defendant following the closing down of the defendant's business was also within the plaintiff's knowledge.

[11] The defendant also alleged that the plaintiff had committed the following wrongdoings:

(a) the plaintiff had unilaterally appointed his wife, Sophia Cai, to oversee the defendant's operations and finance in Shanghai, and represented that the defendant has a 'Shanghai Office'. This was done without approval from Sharon Ho; and

(b) the defendant had been dealing with Shanghai Youxiang Co Ltd ('Shanghai Youxiang') since June 2020, at the instructions of the plaintiff. Shanghai Youxiang had initially placed orders with the defendant, but subsequently cancelled its orders. The defendant refunded Shanghai Youxiang's payment, as instructed by the plaintiff. In October 2020, the defendant discovered that the plaintiff was the executive director of Shanghai Youxiang, while Sophia Cai was its shareholder and director. This put the plaintiff in a position of conflict of interest, considering his role in the defendant. The defendant had cancelled the plaintiff's access to the defendant's account, due to concerns of misuse of the defendant's funds.

THE LAW

[12] The originating summons is filed pursuant to ss 347 and 348 of the Companies Act 2016 ('the CA 2016'). Section 347 grants the right to a complainant to initiate derivative proceedings, while s 348 sets out the process to obtain leave to initiate proceedings. The relevant provisions are set out below:

347 Derivative proceedings

(1) *A complainant may, with the leave of the Court initiate, intervene in or defend a proceeding on behalf of the company.*

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.

348 Leave of Court

(1) An application for leave of the Court under section 347 shall be made to the Court without the need for an appearance to be entered.

(2) *The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of Court under* section 347.

(3) Where leave has been granted for an application under section 347, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) *In deciding whether or not the leave shall be granted, the Court shall take into account whether —*

(a) *the complainant is acting in good faith; and*

(b) *it appears prima facie to be in the best interest of the company that the application for leave be granted.*

(5) Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave of the Court. (Emphasis added.)

[13] Sections 347 and 348 of CA 2016 are in *pari materia* with ss 181A to 181E of the Companies Act 1965 ('the CA 1965'). Therefore, cases on ss 181A to 181E of the CA 1965 will be referred to in my assessment.

[14] In deciding whether to allow leave, the requirements in s 348 of the CA 2016 must be met. In this regard, the court must be satisfied that:

(a) 30 days' notice has been given to the director of the defendant, of the plaintiff's intention to apply for leave under s 347;

(b) the plaintiff is acting in good faith; and

(c) it is prima facie in the best interest of the defendant that this application for leave is granted.

[15] The need to comply with these requirements was set out in *Lembaga Tabung Angkatan Tentera v Prime Utilities Bhd* [2013] 7 MLJ 831.

[16] I am also guided by *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636, where the Court of Appeal held that leave to bring a derivative action must not be granted lightly:

> [8] ... The intention of ss 181A–181E of the CA is to enable a member, present or past, to seek leave to bring an action in the name of the company to recover losses sustained by that company. *As such, leave to bring a derivative action must not be given lightly (see Swansson v RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583*). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. Granting leave is therefore final in that sense and not interlocutory in character.* In this respect, the learned judge was wrong in stating cursorily that the matter before him was 'only an application for leave' and relying on the low threshold used under O 53 of the RHC *(application for judicial review) ie to determine if an application for judicial review is not frivolous or vexations by relying on cases like Clear Water. The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s 181A of the CA are met. A low threshold of merely determining if there existed a prime facie case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s 181A of the CA, and compliance to those statutory requirements* (see *Charlton v Baber* (2003) 21 ACLC 1671). (Emphasis added.)

ASSESSMENT AND FINDINGS

[17] Having set out the law, I will move on to determine whether the requirements for the grant of leave to commence a derivative action have been met. In this regard, it is undisputed that:

(a) the plaintiff is a member of the defendant, and is a 'complainant' as defined under s 345 of the CA 2016. The plaintiff therefore has the locus standi to file this action; and

(b) the plaintiff has given 30 days' notice to the director of the defendant, Sharon Ho, of the plaintiff's intention to apply for leave.

[18] The issues that remain in dispute are:

(a) whether the plaintiff is acting in good faith; and

(b) whether it is prima facie in the best interest of the defendant that this application for leave is granted.

IS THE PLAINTIFF ACTING IN GOOD FAITH?

[19] The test to determine whether an applicant is acting in good faith is set out in *Swansson v RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583. *Swansson* was referred to in *Celcom (M) Bhd*. The Court of Appeal held that the onus of proof to show good faith is on the applicant, on a balance of probabilities.

[20] The Court of Appeal then went on to state, at para 16, that this requirement will depend on the factual circumstance which comes before the court. The following passage of the judgment of Palmer J in *Swansson* was cited:

> Nevertheless, in my opinion, there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of s 237(2)(b) is satisfied. *The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success.* Clearly, whether the applicant honestly holds this belief *would not simply be a matter of bald assertion:* the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. *The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.* (Emphasis added.)

[21] It is clear that the test of good faith is two-fold:

(a) whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. This belief cannot be based on a bald assertion; and

(b) whether the applicant is seeking to bring the derivative action for such a collateral purpose as would amount to an abuse of process.

[22] I am of the view that the plaintiff has not proven, on a balance of probabilities, that he is acting in good faith. This is because firstly, he has not sufficiently shown that a good cause of action with a reasonable prospect of success exists.

[23] On this, the High Court case of *Fazal Ellahi Oli Mohamed & Anor v KM Oli Mohamed Sdn Bhd* [2020] MLJU 2328; [2020] 1 LNS 221 is of relevance. In that case, leave to commence derivative action was dismissed by the court, as it was held that the allegations by the plaintiff were derived solely from the books and records to which they had access. Liza Chan JC held as follows:

> [39] In my view, in the round, it is significant to note that the allegations pertaining to Kassim and his companies making secret profits is not borne out by concrete evidence adduced by the applicants to show that the respondent has in any way suffered any kind of loss or that there is a diminution in the value of the respondent's shares. *Insinuations will not do especially when both applicants in their affidavits*

> *deposed to their knowledge of facts from books and records of the respondent which they have access to. No attempt was made to give particulars nor a shred of evidence tendered at all on the secret profits. I find these allegations of secret profits made by Kassim are just that — allegations without anything to support them but merely speculation on the part of the applicants. At most, in my view, these were mere suspicions but nothing more.* I would therefore resolve the conflict of evidence on affidavit, in accordance with the principles enunciated in *Eng Mee Yong v Letchumanan and Tahansan* and accept the respondent's evidence that there are no secret profits made. (Emphasis added.)

[24] In the present case, the plaintiff's allegations appear to have been grounded on conjectures made from the plaintiff's perusal of the defendant's accounts. They are in essence based on speculation and suspicions of impropriety. I am unable to see any sufficient evidence put forward by the plaintiff to support these allegations.

[25] It must be highlighted that the defendant had provided explanations on the allegations raised by the plaintiff. In relation to the allegation of suspicious transactions, the defendant explained that:

(a) the director's emoluments of RM5,500 per month paid to Sharon Ho were approved by a director's resolution dated 20 May 2020;

(b) Desmond Lee and Christine Yong were employees of the defendant as evidenced by the letters of employment dated 1 June 2020. There is evidence that the plaintiff was aware of this, as he had instructed both Desmond Lee and Christine Yong on matters related to the defendant's operations;

(c) the allegation that Desmond Lee had embezzled the defendant's funds and received secret profits is not supported by credible evidence. This allegation arises from an amount of RM3,000 that had been deducted from payments for containers delivered to the defendant. The defendant has shown that this amount was deducted from payments to the supplier, as containers that were delivered were not in line with specifications; and

(d) in relation to the disposal of the defendant's assets, it is also in evidence that the plaintiff was aware of the intention to dispose of these assets. The plaintiff had instructed employees of the defendant on the disposal of these assets.

[26] The plaintiff's allegations that Sharon Ho, Desmond Lee and Christine Yong created fictitious transactions, conducted improper accounting and deliberately inflated the defendant's expenses were also rebutted by the defendant. I find the defendant's responses to these allegations to be more probable than the plaintiff's allegations, which for the most part are bare assertions. The defendant's explanations are as follows:

(a) on the allegation of the loss of exchange currency amounting to RM59,849, the defendant explained that this was within the plaintiff's knowledge. The loss had arisen from the plaintiff's unilateral imposition of the exchange rate for transactions involving Shanghai Youxiang;

(b) on the allegation of the increase in the loss arising from the disposal of a nitrogen freezer, amounting to RM201,040, the defendant explained that this resulted from the defendant being forced to find an alternative buyer when the buyer introduced by the plaintiff did not appear;

(c) on the allegation that Sharon Ho had written off an amount of RM150,000 being the book value of the freezer to hide the profit made from the sale of the freezer, the defendant explained that it had disposed of the freezer in January 2021 at the price of RM80,000. The amount of RM150,000 had been written off in the defendant's November 2020 accounts, but the April 2021 accounts reflected the payment of RM80,000 received by the defendant. The plaintiff's allegation that Sharon Ho was making secret profit from the sale of the freezer was a mere insinuation, unsupported by evidence;

(d) on the allegation that the legal fees of RM5,000 were for personal purposes of Sharon Ho, Desmond Lee and Christine Yong, the defendant explained that the fees were paid by the defendant to commence an action against the plaintiff for breach of his duties;

(e) on the allegation of the use of the defendant's funds for maintenance of personal motor vehicles, the defendant explained that these vehicles were used when performing work for the defendant; and

(f) on the allegation that Sharon Ho had made a director's loan to the defendant amounting to RM52,832.27 with the end aim of embezzling the defendant's funds, the defendant explained that the loan was made to defray the defendant's expenses. The plaintiff's allegation is purely speculative and is not supported by evidence.

[27] I also find the plaintiff's claims that the defendant had failed to fulfil contractual obligations and to make the necessary refunds to Shanghai Youxiang lack good faith. This is because the plaintiff was the executive director of Shanghai Youxiang, while his wife Sophia Cai was its shareholder and director. His conduct in the management of the orders of Shanghai Youxiang demonstrates how he put himself in a position of conflict of interest, by placing the interests of Shanghai Youxiang over the interests of the defendant.

[28] On the claim that Desmond Lee had failed to top up the capital of the defendant, I accept the defendant's argument that Desmond Lee is under no obligation to top up the defendant's capital. It is to be noted that Desmond Lee is not even a shareholder of the defendant.

[29] Based on the above and taking into account that there is insufficient evidence to support the plaintiff's allegations, I am unable to see how the plaintiff could honestly believe that he has a reasonable prospect of success in his claim against the defendant, Sharon Ho, Desmond Lee and Christine Yong. I find that the plaintiff has failed to meet the first element of the test of good faith.

[30] The second element of the test of good faith is whether this action was bought by the plaintiff for a collateral purpose and for his personal interest. I considered this test by taking into account the fact that the plaintiff's allegations appear to have arisen from the following personal grievances:

(a) the plaintiff's unhappiness with the defendant's decision not to refund payments made for orders by Shanghai Youxiang. I must again emphasise that the plaintiff is an executive director of Shanghai Youxiang, while his wife is a shareholder and director; and

(b) the allegation that Desmond Lee had failed to top up the defendant's capital. This top up was intended for the purpose of the refund to Shanghai Youxiang.

[31] Based on the above, it would appear that the relief sought by the plaintiff in this action was not sought on behalf or for the benefit of the defendant, but is made in the interest of Shanghai Youxiang and for the plaintiff's personal purposes. In the case of *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340, which was adopted in *Fazal Ellahi*, the Singapore Court of Appeal held that the respondent did not act in good faith in applying for leave to commence a derivative action, as the respondent was actuated by private motives which amounted to a collateral personal purpose. These collateral purposes include seeking additional remuneration from the company and attempting to secure control of the company. There was also obvious ill-will between the parties in relation to financial issues of the company.

[32] The plaintiff argued that the presence of private interests would not necessarily negate good faith if the same coincides with the interests of the company (see *Ong Keng Huat v Fortune Frontier (M) Sdn Bhd & Anor* [2015] 11 MLJ 604). However, in this case, the plaintiff's private interests, specifically those arising from the defendant's dealings with Shanghai Youxiang, do not coincide with the interests of the defendant. The return of the refund to Shanghai Youxiang would in fact be at the expense of the defendant.

[33] Taking the above assessment into account, I find that the second element of the test of good faith has not been met by the plaintiff.

[34] Further, the plaintiff's role in Shanghai Youxiang created a conflict of interest with his role in the defendant. This can be seen in the plaintiff's behaviour in dealings involving Shanghai Youxiang and the defendant. The plaintiff had unilaterally determined the exchange rate for orders which would have resulted in a loss to the defendant at the benefit of Shanghai Youxiang, insisted on refunds being paid to Shanghai Youxiang without taking into account costs arising from the cancelled orders, and represented that Shanghai Youxiang would use packaging for the cancelled orders for further orders, which were not forthcoming.

[35] Applications for leave to commence derivative actions have been dismissed by the courts where a conflict of interest exists. In *FMC Petroleum Equipment (Malaysia) SDN BHD v FMC Wellhead Equipment Sdn Bhd & Anor* [2019] MLJU 473; [2019] 1 LNS 758, the court dismissed the plaintiff's application for leave to initiate a derivative action on the premise that a conflict of interest and misfeasance were reflected in the prayers sought by the plaintiff. In *Mahbubul Matin v Firoze Muhammad Zahidur Rahman & Anor* [2019] MLJU 1585; [2019] 1 LNS 832, it was held that the applicant had placed himself in a position of conflict of interest, as he had set up another company with a similar nature of business. Noorin Badaruddin J held that there is a clear lack of good faith by the applicant in seeking leave to file a derivative action.

[36] I have reached the same conclusion in this case. The plaintiff's role in Shanghai Youxiang and the way he conducted business with Shanghai Youxiang demonstrated a conflict of interest on his part, and is indicative of a lack of good faith in his seeking leave to initiate a derivative action against the defendant.

IS IT PRIMA FACIE IN THE BEST INTEREST OF THE DEFENDANT THAT THIS APPLICATION FOR LEAVE IS GRANTED?

[37] The next requirement that the court must be satisfied with is whether it is prima facie in the best interest of the defendant that the plaintiff's application for leave to commence a derivation action is granted.

[38] In considering this requirement, the court has to look into the commercial interest of the defendant, to see if the defendant will gain substantially in the proposed derivative action (see *Eow Fun Siew & Anor v Mutual Life Sdn Bhd* [2017] MLJU 1387).

[39] On this issue, the Singapore Court of Appeal in *Ang Thiam Swee*, found that the proposed derivative action in that case which was a claim for a lump sum of SGD200,000, would be insufficient to constitute a practical gain on the company:

A [57] ... While the company might have an interest in recovering any misappropriated funds, *it is difficult to see what practical gain the company could obtain from the present matter if it is allowed to proceed further (ie, if Low is given leave to bring a statutory derivative action). This is a situation where the parties are pointing accusatory fingers at each other, and neither party appears to be wholly without blame.* B *It is not clear how the proposed statutory derivative action would resolve rather than actuate this.* Moreover, the Official Assignee has reserved his position on the matter, so that there is no positive affirmation from the majority shareholder that the company views the action as worthwhile. Although it is self-evident that each application for leave to bring a statutory derivative action should turn on its own merits rather than on the view of the majority shareholder(s), the silence of the C Official Assignee in the present appeal does suggest that the application is outside of the company's interest. This brings us back to the recurring theme that Low is seeking to use s 216A of the Companies Act as a means of perpetuating his own peripheral agenda. At the end of the day, the company appears to be coping well and neither of the two Stone Forest reports disclosed in these proceedings raised any red D flags. *It is therefore our view that the application offers no practical or commercial merit for the company. We are thus unable to agree with the judge below that the mere prospect of recovering allegedly misappropriated funds would be prima facie in the interests of the company in the circumstances of this case, especially when the majority shareholder appears unsupportive.* (Emphasis added.)

E

[40] The reliefs claimed on behalf of the defendant, as set out in the proposed statement of claim are for declarations that Sharon Ho breached her fiduciary duties as a director of the defendant, that Sharon Ho, Desmond Lee and Christine Yong conspired to injure the defendant, and for an account of F sums received and an order for payment of sums received by Sharon Ho, Desmond Lee and Christine Yong to the defendant. Taking these proposed reliefs into account and considering that the defendant has ceased its business, I am of the considered view that there would not be any practical gain for the defendant if the plaintiff is allowed to proceed with the derivative action.

G

[41] I have also taken note that in this action, the plaintiff has prayed that he be indemnified by the defendant on an indemnity basis, for costs and expenses, disbursements, tax and legal fees incurred for bringing the derivative claim. The granting of this prayer would result in severe financial implications on the H defendant. In *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2019] 10 MLJ 693, a High Court case which has since been affirmed by the Court of Appeal, it was held that the proposed action is not prima facie in the best interest of the defendant company, as the plaintiff had failed to consider the potential costs of the proposed derivative action:

I

[152] *No consideration appears to have been given as to how much the proposed action by the defendant would cost in terms of professional fees including the cost of an expert's opinion and fee for attendance in court as a witness, not to mention the cost of an appeal against the decision of the court at first instance that may follow. It has not been demonstrated that from a cost benefit perspective, even if there exists a reasonable cause*

of action, whether such an action would be worthwhile for the defendant to pursue, bearing in mind the insurance monies received and the close-out supplementary agreement with Vale in respect of NTT Lumut. The proposed action, even if successful, may be a Pyrrhic victory for the defendant. (Emphasis added.)

[42] In this case, the plaintiff is praying for the defendant to bear all costs and expenses on an indemnity basis to pursue the claims against Sharon Ho, Desmond Lee and Christine Yong, which as I have concluded above, are grounded primarily on his personal grievances. As such, I am of the view that it would not be in the commercial interest of the defendant to pursue the proposed derivative action.

[43] Having found that the plaintiff is not acting in good faith in applying for leave to commence a derivative action, and that it is not in the interest of the defendant for the application for leave to be granted, it would follow that the originating summons must be dismissed.

[44] I must also add that there are other avenues available for the plaintiff to further pursue his claims. Claims related to Shanghai Youxiang could have been pursued against Shanghai Youxiang, instead of using a derivate action as a backdoor way to obtain remedies, which would not be in the best interest of the defendant. Further, a claim for oppression could have also been pursued, had he felt that Sharon Ho, Desmond Lee and Christine Yong conducted the affairs of the company in a manner that is oppressive to his rights as a shareholder. With these alternative avenues available to the plaintiff, I fail to see how the commencement of a derivative action is in the best interest of the defendant.

DECISION

[45] Based on the assessment set out above, I find that the plaintiff is not acting in good faith in seeking leave to commence a derivative action, and that it would not be prima facie in the best interest of the defendant for leave to be granted.

[46] The originating summons is dismissed, with costs.

Originating summons dismissed with costs.

Reported by K Selvaraju